WONG SEE LEE & ORS.

v.

TING SIIK LAY

FEDERAL COURT, KUCHING
MOHD AZMI FCJ
EDGAR JOSEPH JR. FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-80 OF 1994]
5 DECEMBER 1996

LAND LAW: *Caveats - Sarawak Land Code (Cap. 81) - Caveat - Extension - Whether properly granted - Triable issues - Duty of Court - Whether must satisfy that there existed at least one major triable issue - Whether to decide on balance of convenience - Sarawak Land Code (Cap. 81) ss. 132(1)(f), 173 - National Land Code 1965, ss. 44(1)(b), 323*

LAND LAW: *Caveats - Extension - Caveatable interest - Right of support to land - Whether a right "ex jure natural" - Loss of right caused by negligence of adjoining landowner - Whether constituted good caveatable interest - Sarawak Land Code (Cap. 81), ss. 132(1)(f), 173 - National Land Code, ss. 44(1)(b), 323*

LAND LAW: *Right of support to land - Claim for disturbance thereof - Whether constituted a good action at common law - Whether claim recognised by statutes - National Land Code s. 44(1)(b) - Sarawak Land Code (Cap. 81), s. 173(a)*

The appellants and the respondent were proprietors of adjoining parcels of land in Miri, Sarawak. The respondent alleged that the appellants, while engaged in excavation activities on their land ('Lot 3029'), had caused serious damage to her adjoining property, and consequently sued the latter for negligence and nuisance *vide* Miri High Court Civil Suit No. MR 54/1991 ('the pending action'). In essence the respondent claimed that the appellants, when carrying out the works, had failed to leave proper support for her land ('Lot 413'), thereby causing subsidence to her said land which in turn damaged her house.

The pending action apart, in January 1992, the respondent had also lodged a caveat on the appellants' land under the Sarawak Land Code to prevent the appellants from dealing further with Lot 3029. In September 1992, the appellants applied by motion to remove the caveat whereupon the respondent applied by originating summons for extension of the said caveat. The learned Judge

dismissed the appellants' motion and, allowing the respondent's summons, ordered that the caveat remain until the disposal of the pending action. Against these interlocutory orders the appellants have now appealed.

It was not in dispute that prior to the lodgment of the caveat aforesaid, the respondent had obtained an injunction from the High Court, that was affirmed by the Supreme Court, restraining the appellant "from further excavating the portion of their land which provides natural support" to her land. It was also a fact that, at the time of lodgment of the caveat, the appellants were on the verge of disposing Lot 3029 to a third party. These facts notwithstanding, the appellants argued that the learned Judge had erred in law in failing to remove the caveat because, unlike the National Land Code, the Sarawak Land Code does not confer any right of support to land, with the result that no caveatable interest in Lot 3029 could have accrued to the respondent. It was also submitted that under the Sarawak Land Code, a claim for a right to land support could only arise under the exception to s. 132(1)(f) thereof, i.e. under easement, but this option, on the facts, was not invocable by the respondent.

Held:
Per Mohd Azmi FCJ:

[1] On the facts, the "onus" is on the respondent to show why the caveat should continue.

[2] At this interlocutory stage, it is sufficient for the caveat to continue on balance of convenience, if the Court is satisfied that there is at least one major serious issue to be tried so as to show that the claim in the pending action is not frivolous or vexatious. An appellate Court will not interfere once discretion has been judicially exercised on balance of convenience.

[3] It follows that, in this case, once the learned Judge was satisfied that a serious issue in negligence had been raised by the appellants' excavation activities, by not having proper or sufficient support for the caveator's property thereby causing serious damage to her house, it is not necessary for the learned Judge to go further by dismissing the other issue on nuisance, or interference with the respondent's right of natural support. Both these issues should be left for final determination in the pending action.

[4] Claims for disturbance of the right to support of land are recognised by the common law. This common law right of support by neighbouring land was given statutory recognition by s. 44(1)(b) National Land Code. The absence of provision similar to s. 44(1)(b) in the Sarawak Land Code, however, does not deprive a person with a legal right in land in Sarawak of his entitlement to common law right of soil to soil support.

[5] An easement is distinct from the natural right to support of a landowner from a neighbour's land. The respondent was right in her submission that, unlike an easement of the right to support of building, the right to support of land soil by soil should be regarded as an incident of property rather than easement.

[6] The respondent's claim is grounded on her natural right of support as incidence of proprietorship under the Sarawak Land Code. Consequently, she is entitled to soil to soil support from Lot 3029, not as an easement but as a landowner's right *"ex jure natural"*. It is an ordinary right of property necessarily and naturally attached to the soil which requires no separate registration from the land itself. Such right constitutes a caveatable interest under the Sarawak Land Code, and accordingly, the respondent has a valid cause of action in the pending suit.

[7] The appellants' argument under s. 132(1)(f) Sarawak Land Code is totally irrelevant. This apart, the phrase "subject to the provisions of this Code" in s. 132 of the Sarawak Land Code was relevant for the purpose of interpreting s. 132(1)(f) therein. The effect is that, s. 132(1)(f) must be read *inter alia, s*ubject to s. 173 of the Code which is equivalent to s. 323 of the National Land Code. Under s. 173(a) Sarawak Land Code, the respondent clearly has a caveatable interest.

[8] The Supreme Court having upheld the interlocutory injunction restraining the appellants from cutting, excavating and removing earth constituting the right of natural support to respondent's land, the respondent has, by that order, obtained a balance of convenience in her favour for the issuance and extension of the caveat until the disposal of the High Court action. Consequently, the learned Judge was right in relying on the order in concluding that in the circumstances of the case the right of natural support constitutes a caveatable interest.

Per curiam:

[1] Our Courts are entitled to take judicial notice of the fact that Malaysia records one of the highest annual rainfalls in the world which inevitably makes soil erosion and landslides a matter of foreseeable consequences whenever there is disturbance of the soil as a result of human activities.

[2] Building retaining walls has become one of the bulwarks in the fight against soil erosion and in the preservation of soil to soil support enjoyed by neighbouring lands particularly where excavation activities have become necessary on one's property. This duty of care by landowners to their

neighbours not to disturb or withdraw natural right to support, i.e. soil to soil support, should no longer be questioned in this country as a cause of action in negligence and/or nuisance, where the breach of such duty has caused injury to the adjoining property.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Kanun Tanah Sarawak (Cap. 81) - Kaveat - Perlanjutan - Samada telah diberikan menurut aturan - Isu-isu yang boleh dibicarakan - Kewajipan Mahkamah - Samada mestilah berpuashati bahawa wujud sekurang-kurangnya satu isu utama yang boleh dibicarakan - Samada harus memutuskan berdasarkan imbangan keselesaan - Kanun Tanah Sarawak (Cap. 81) ss. 132(1)(f), 173 - Kanun Tanah Negara 1965, ss. 44 (1)(b), 323*

UNDANG-UNDANG TANAH: *Kaveat - Perlanjutan - Kepentingan yang boleh dikaveatkan - Hak sokongan kepada tanah - Samada merupakan hak "ex jure natural" - Kehilangan hak yang disebabkan oleh kecuaian tuan-tanah yang bersempadanan - Samada membentuk kepentingan yang boleh dikaveatkan - Kanun Tanah Sarawak (Cap. 81) ss. 132(1)(f), 173 - Kanun Tanah Negara ss. 44(1)(b), 323*

UNDANG-UNDANG TANAH: *Hak sokongan kepada tanah - Tuntutan bagi gangguan terhadapnya - Samada membentuk satu tindakan yang baik di sisi common law - Samada tuntutan diiktiraf oleh statut - Kanun Tanah Negara s. 44(1)(b) - Kanun Tanah Sarawak (Cap. 81) s. 173(a)*

Perayu dan responden merupakan tuanpunya tanah-tanah yang bersempadanan di Miri, Sarawak. Responden mengatakan bahawa perayu, ketika menjalankan kerja-kerja penggalian di atas tanah mereka ('Lot 3029'), telah menyebabkan kerosakan yang serius kepada hartanahnya yang bersempadanan, dan dengan itu telah mendakwa pihak yang terkemudian kerana kecuaian dan kacau-ganggu melalui Guaman Sivil Mahkamah Tinggi Miri No. MR 54/1991 ('tindakan yang menanti penyelesaian'). Secara intinya, responden menuntut bahawa perayu, ketika menjalankan kerja-kerja tersebut, telah gagal mengadakan sokongan yang wajar bagi tanahnya ('Lot 413'), yang dengan itu telah menyebabkan penenggelaman tanah beliau yang sebaliknya telah merosakkan rumahnya.

Selain daripada tindakan yang menanti penyelesaian itu, dalam bulan Januari 1992, responden telah juga menyerah-simpan satu kaveat ke atas tanah perayu tersebut di bawah Kanun Tanah Negara bagi menghalang perayu daripada berurusan seterusnya dengan Lot 3029. Dalam bulan September 1992, perayu

telah memohon melalui usul untuk membatalkan kaveat itu, lalu responden memohon melalui saman pemula untuk perlanjutan kaveat tersebut. Hakim yang bijaksana telah menolak usul perayu dan, membenarkan saman responden, telah memerintahkan supaya kaveat itu kekal sehingga penyelesaian tindakan yang menanti penyelesaian itu. Terhadap perintah-perintah interlokutori ini perayu telah kini mengemukakan rayuan.

Ianya tidak dipertikaikan bahawa sebelum penyerahsimpanan kaveat yang tersebut di atas, responden telah mendapatkan satu injunksi daripada Mahkamah Tinggi, yang telah diikrarkan oleh Mahkamah Agung, yang menghalang perayu "from further excavating the portion of their land which provides natural support" kepada tanah beliau. Ianya juga merupakan satu fakta bahawa, ketika penyerahsimpanan kaveat itu, perayu hampir melupuskan Lot 3029 kepada satu pihak ketiga. Meskipun terdapatnya fakta-fakta ini, perayu telah berhujah bahawa Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang apabila gagal membatalkan kaveat tersebut kerana, tidak seperti Kanun Tanah Negara, Kanun Tanah Sarawak tidak memberikan apa-apa hak sokongan kepada tanah, yang bermakna bahawa wujud kepentingan yang boleh dikaveatkan dalam Lot 3029 yang mungkin telah terakru kepada responden. Adalah juga dihujahkan bahawa di bawah Kanun Tanah Sarawak, sesuatu tuntutan untuk mendapatkan hak kepada sokongan tanah hanya boleh dibangkitkan menurut pengecualian di bawah s. 132(1)(f) di situ, iaitu, di bawah isemen, tetapi opsyen ini, berdasarkan fakta, tidak dapat digunakan oleh responden.

Diputuskan:
Oleh Mohd Azmi HMP:

[1] Berdasarkan fakta-fakta, "onus" adalah terletak pada responden bagi menunjukkan mengapa kaveat tersebut seharusnya berterusan.

[2] Di peringkat interlokutori ini, ianya memadai bagi kaveat diteruskan atas imbangan keselesaan, jika Mahkamah berpuashati bahawa terdapat sekurang-kurangnya satu isu utama yang serius untuk dibicarakan agar dapat menunjukkan bahawa tuntutan dalam tindakan yang menanti penyelesaian tersebut adalah tidak remeh atau menyusahkan. Sesebuah Mahkamah rayuan tidak akan mencampuri sebaik sahaja budibicara telah dilaksanakan secara kehakiman atas imbangan keselesaan.

[3] Ianya mengikut bahawa, dalam kes ini, sebaik sahaja Hakim yang bijaksana berpuashati bahawa satu isu serius dalam hal kecuaian telah dibangkitkan oleh aktiviti-aktiviti penggalian perayu, dengan tidak mempunyai sokongan yang wajar atau memadai bagi hartanah pengkaveat yang dengan

itu telah menyebabkan kerosakan yang serius kepada rumah beliau, ianya adalah tidak perlu bagi Hakim yang bijaksana untuk pergi lebih jauh untuk menolak isu yang lain mengenai kacau-ganggu, atau gangguan terhadap hak responden akan sokongan semula jadi. Kedua-dua isu ini seharusnya dibiarkan untuk penentuan muktamad dalam tindakan yang sedang menanti penyelesaian.

[4] Tuntutan bagi gangguan akan hak kepada sokongan tanah diiktiraf oleh common law. Hak common law terhadap sokongan tanah oleh tanah yang bersempadanan ini telah diberi pengiktirafan statutori oleh s. 44(1)(b) Kanun Tanah Negara. Ketiadaan peruntukan yang serupa dengan s. 44(1)(b) dalam Kanun Tanah Sarawak, bagaimanapun, tidak menjejaskan hak common law seseorang yang mempunyai kepentingan dalam tanah di sisi undang-undang di Sarawak untuk mendapat hak sokongan tanah oleh tanah.

[5] Sesuatu isemen adalah berbeza daripada hak semulajadi terhadap sokongan yang terakru kepada seseorang tuan-tanah terhadap tanah jiran. Responden adalah betul dalam penghujahannya bahawa, tidak seperti suatu isemen terhadap hak untuk menyokong bangunan, hak untuk menyokong tanah oleh tanah seharusnya dianggap sebagai satu insiden hartanah dan bukannya isemen.

[6] Tuntutan responden telah diasaskan atas hak semulajadi sokongan beliau sebagai insiden pemilikan di bawah Kanun Tanah Negara. Akibatnya beliau adalah berhak kepada sokongan tanah kepada tanah daripada Lot 3029, bukannya sebagai isemen tetapi sebagai hak tuan-tanah "*ex jure natural*". Ianya merupakan hak biasa hartanah yang secara perlunya dan secara semulajadi terletak kepada tanah yang tidak memerlukan pendaftaran yang berasingan daripada tanah itu sendiri. Hak sedemikian membentuk kepentingan yang boleh dikaveatkan di bawah Kanun Tanah Sarawak, dan berikutan itu, responden mempunyai kausa tindakan yang sah dalam guaman yang menantikan penyelesaian.

[7] Hujahan perayu di bawah s. 132(1)(f) Kanun Tanah Sarawak adalah tak relevan. Selain itu, ungkapan, "subject to the provisions of this Code" dalam s. 132 Kanun Tanah Sarawak adalah relevan bagi tujuan mentafsirkan s. 132(1)(f) di dalamnya. Kesannya adalah bahawa, s. 132 (1)(f) mestilah dibaca antara lainnya, tertakluk kepada s. 173 Kanun tersebut yang mana adalah bersamaan dengan s. 323 Kanun Tanah Negara. Di bawah s. 173(a) Kanun Tanah Sarawak, responden jelas mempunyai kepentingan yang boleh dikaveatkan.

[8] Oleh kerana Mahkamah Agung telah mempertahankan injunksi interlokutori yang menghalang perayu daripada memotong, menggali dan mengeluarkan tanah yang mana membentuk hak akan sokongan semulajadi kepada tanah responden, responden, melalui perintah itu, telah mendapat imbangan keselesaan atas namanya bagi pengeluaran dan perlanjutan kaveat itu sehingga penyelesaian tindakan Mahkamah Tinggi. Oleh sebab itu, Hakim yang bijaksana adalah betul dalam bergantung kepada perintah tersebut dalam memutuskan bahawa dalam keadaan kes ini hak sokongan semulajadi membentuk suatu kepentingan yang boleh dikaveatkan.

Per Curiam:

[1] Mahkamah kita berhak untuk mengambil perhatian kehakiman akan fakta bahawa Malaysia mencatatkan jumlah hujan tahunan yang paling tinggi di dunia yang mana dengan cara yang tidak dapat dielakkan menjadikan hakisan dan runtuhan tanah suatu perkara yang boleh dijangkakan apabila terdapatnya gangguan kepada tanah akibat daripada aktiviti-aktiviti manusia.

[2] Membina tembok-tembok penahan telah menjadi satu benteng dalam melawan hakisan tanah dan dalam pemeliharaan sokongan tanah oleh tanah yang dinikmati oleh tanah-tanah yang bersebelahan khususnya di mana aktiviti-aktiviti penggalian telah menjadi perlu pada hartanah seseorang. Kewajipan berjaga-jaga oleh tuan-tanah kepada jiran-jiran mereka untuk tidak menggangu atau menarikbalik hak semulajadi bagi sokongan, iaitu sokongan tanah oleh tanah, tidak seharusnya lagi dipersoalkan dalam negeri ini sebagai satu kausa tindakan kerana kecuaian dan/atau gangguan, di mana pelanggaran kewajipan yang sedemikian telah menyebabkan kerosakan kepada hartanah yang bersempadanan.

[Rayuan ditolak.]

Cases referred to:
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Lamb v. Walker LR 3 QBD 389 ***(cit)***
Guan Soon Tin Mining. v. Ampang Estate Ltd. [1973] 1 MLJ 25 ***(refd)***
Bonomi v. Backhouse ER 120 ELBL & EL 654 ***(refd)***
Chung Khiaw Bank v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 CLJ 675 ***(cit)***
Wisma Punca Emas Sdn. Bhd. v. Dr. Donal R. O'Holohan [1987] 1 MLJ 393 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
National Land Code 1965, ss. 44(1)(b), 323(1)(a)
Sarawak Land Code, ss. 132(1)(f), 173(a)

Other sources referred to:
Introduction to Property Law, Teh and Dwyer, paras. 1312, 1313
MLJ Words and Phrases Judicially Defined, 1990, p. 87

[Appeal from High Court of Miri; Originating Motion No: MR. 4 of 1992 & Originating Summons No: MR. 75 of 1993]

For the appellants - K.Y. Lin; M/s. Kadir, Wong, Lin & Co.
For the respondent - S.H. Lim; M/s. S.H. Lim & Co.

JUDGMENT

Mohd Azmi FCJ:

This appeal is against the orders of Justice Denis Ong Jiew Fook of the High Court in Sarawak not only in refusing to remove but also in extending a private caveat pending the disposal of an action between two neighbouring landowners in Miri Concession Land District. Madam Ting Siik Lay, a houseowner on Lot 413 (the respondent/plaintiff) has filed an action in the High Court against the appellants/defendants for damages for serious injury through loss of support to her property allegedly caused by excavation in the course of housing development activities carried out by the appellants on their adjoining Lot 3029. The respondent has also on 16 January 1992 lodged the present caveat on appellants' land under the Sarawak Land Code (Cap. 81), thereby preventing the appellants as registered proprietors from dealing with their property, in particular from disposing of their housing lots to would-be purchasers. The validity of the caveat would mainly depend on whether the appellants as registered proprietors of Lot 3029 upon which they were permitted to carry on with a housing development project, were under a legal obligation to support the respondent's adjoining land in its natural state.

By originating motion dated 4 September 1992, the appellants applied to remove the caveat; whilst the respondent by originating summons dated 3 September 1993 applied for extension of the caveat. Both applications were jointly heard by the learned trial Judge and on 3 February 1994, His Lordship in dismissing the appellants' motion, and allowing the respondent's originating summons ordered the caveat to remain pending disposal of the respondent's action in the High Court Civil Suit No. MR 54/1991. An order for early trial was also made. Unfortunately, instead of having the action fixed for immediate hearing which probably would have resolved the present dispute by now, the appellants decided to appeal against the interlocutory orders.

In her application for a private caveat to the Land Office Registrar, the respondent in her supporting affidavit *inter alia* set out the fact that on 4 January 1992 the High Court had granted her two injunctions, one of which restrained the appellants "from further excavating the portion of their land

which provides natural support" to her land. She also affirmed that as a co-proprietor of Lot 413, she required the caveat in order "to prevent the defendants from disposing of the said land to any third party before complying with said Court order ... ."

The facts of the case are quite simple. The plaintiff had purchased the house on Lot 413 on 4 September 1991. It was a new house - built and completed in December 1990. Prior to the date of purchase, excavation and other works were already in progress on the appellants' neighbouring land, Lot 3029, for the development of 20 housing lots. Subdivided lots nos. 19 and 20 would be immediately adjacent to plaintiff's property (see proposed Subdivision plan at p. 34 Appeal Record).

In the action filed in the High Court at Miri, the two causes of action for damages pleaded against the appellants are for nuisance and as well as for negligence, arising from the housing project carried out by the appellants on Lot 3029. The respondent alleges that by not leaving proper or sufficient support for her adjoining land Lot 413 when carrying out excavation works, between February 1990 to 29 May 1991 the appellants have caused subsidence to the respondent's land which in turn has damaged her house. It is alleged that such withdrawal of support is an infringement of her right under the common law. Under the cause of action for negligence, the respondent also pleads that the appellants are guilty of negligence in carrying out the said excavation works by breach of their duty of care owing to the respondent, and for causing damage to her property.

In their defence and counter-claim the appellants denied liability in law both under the tort of nuisance and negligence. It is their averment that the slope between the two plots of land is not natural, but was artificially created by a third party in 1986, by depositing excess earth in the valley of appellants' land. As such, they aver that there is no question of the respondent having a natural right of support. In the alternative they aver that even if there was such a right of support, that right was acquired by the purchaser in title of Lot 413 and could not pass to the plaintiff as a subsequent purchaser on 4 September 1991, by which date, the acts complained of (i.e. the excavation) had long been carried out. It is accordingly the defence case that the respondent must take Lot 413 as she found it at the time of purchase. At this interlocutory stage, it must be noted that we are not concerned whether the appellants did in fact cause the subsidence, or whether the damage to the respondent's house was caused by the subsidence although there is no serious dispute that the respondent's house was indeed seriously damaged. The liability of the appellants must necessarily be proved later at the hearing proper by the respondent.

Before us, the appellants are aggrieved by the order of the learned Judge in refusing to remove the caveat. The main criticism against the decision of the learned Judge is grounded on the argument that His Lordship has erred in law and in fact in failing to appreciate that unlike the National Land Code, the Sarawak Land Code does not confer any right of support to land, and as such, the respondent has no caveatable interest in the appellants' land - Lot 3029. Since the appeal before us arose out of the dismissal of the appellants' application to remove the caveat, we would first look into the well-established principle governing the removal of private caveat under the Sarawak Land Code before venturing into the alleged difference between that Code and the National Land Code, both of which have adopted the Torrens system.

In this appeal, just as in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 at p. 214, the caveatees are the registered co-owners of the land and they themselves are the applicants for the removal of the caveat lodged by their neighbour - the respondent. In such a situation, the "onus" as defined by Lord Diplock is clearly on the caveator (the respondent/plaintiff) to show why the caveat should continue. It should be observed that depending on the facts of each case the "onus" need not necessarily be on the caveator in all situations. This may happen for instance, where both the caveator and the applicant for removal are not the registered proprietors, but only have interests in the land. In our opinion it is sufficient for the caveat to continue on balance of convenience, if the Court is satisfied that there is at least one major serious issue to be tried, without having to decide on all the remaining issues as if the caveator's action was being heard for final disposal, unless of course such other issues could also be determined in favour of extending the caveat. Where some of the several issues are in favour of the caveator and some in favour of the caveatee, it is better in our view that all the other remaining issues be fully and finally determined at the hearing of the caveator's pending action, for to do otherwise at the interlocutory stage would unfairly and unnecessarily result in tying the hands of the Judge who would eventually be hearing the main action. All the Court needs to be satisfied at the interlocutory stage is that the caveator has raised one major serious issue to be tried so as to show that his claim in the pending action is not frivolous or vexatious. Once the discretion has been judicially exercised on balance of convenience, an appellate Court ought not to interfere. Thus, Lord Diplock in *Eng Mee Yong,* speaking for the Privy Council said:

> Whereas the procedure under s. 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the Court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat - typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has

not yet been completed by a proper instrument of transfer duly registered. In their Lordship's view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e. the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases, it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s. 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s. 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s. 327.

It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The Court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the Court to be just and convenient to do so. Similarly in s. 327 it is provided that "the Court ... may make such order on the application as it may think just" The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", a "*prima facie* case" or a "strong *prima facie case*" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon Ltd.* [1975] AC 396.

This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat; he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In this case once the learned Judge was satisfied that a serious issue in negligence had been raised by the appellants in carrying out excavation activities by not having proper or sufficient support for the caveator's property thereby causing serious damage to her house, it would not have been necessary in the circumstances for the learned trial Judge to go any further by dismissing the other issue on nuisance raised by the caveator on interference with her right of natural support. In our view, the learned Judge in the circumstance of the case, ought to have left both issues for final determination in the pending action, for which he has ordered an early trial.

As indicated earlier on, in the action proper, the respondent as registered co-proprietor of Lot 413 is claiming a right of natural support from appellants' Lot 3029. In fact in a related interlocutory matter, the same learned Judge had granted on 4 January 1992 an order of interim injunction not only restraining the present appellants from cutting, excavating and removing earth constituting the natural support to respondent's property, but also an interlocutory injunction for the appellants to build and construct retaining wall on their Lot 3029 at their own costs. In that interlocutory injunction proceedings, the learned Judge had said:

> It is a fact that the plaintiff's house is a new house completed in December 1990 as certified in Ex. LSH 3. The photos at Exs. LSH 4, LSH 5, LSH 8, LSH9, LSH 10 and LSH 11 of encl. (16) show cracks to the concrete wall fencing and the concrete house and these cracks are progressively deteriorating. The report of the consulting engineers and surveyors at Ex. LSH I to encl. (20) attribute such damage to land slippage which occurred as a direct result of recent removal of support during excavation of Lot 3029. In my view, further excavation of the earth on Lot 3029 bordering Lot 413, Lot 10 and Lot 71 as shown on the site layout plan annexed to the affidavit at encl. (5) without the retaining walls being first constructed as required by the approving authorities may well be disastrous to the land in Lot 413 its building and concrete wall fencing. The photographs speak volumes and I do not think that the injunction prayed for in relief (1) of encl. (5) should wait a moment longer particularly during this landas season.
>
> As regards the mandatory order prayed for in relief (2) of encl. (5) that too should not wait a moment longer. The retaining wall as approved by the approving authorities should have been constructed first to protect the earth in Lot 413, along its border with Lot 3029.

It is important to observe that on an appeal by the present appellants, the then Supreme Court had ordered the prohibitory or restraining injunction to remain but quashed the mandatory injunction. From the Supreme Court order in upholding the prohibitory injunction, it can reasonably be gathered that the Supreme Court must have found that there was indeed a serious question to be tried on the issue of a right of natural support claimed by respondent as

registered proprietor of Lot 413 from appellants' Lot 3029. In our view, the learned Judge is justified in relying on the order of the Supreme Court in concluding that in the circumstances of the case the right of natural support constitutes a caveatable interest, at least for the purpose of giving sufficient teeth for the Supreme Court order to bite pending the disposal of the action proper, particularly having regard to the finding of facts by the learned Judge that Lot 3029 was about to be transftered to a third party (Wanbrite Sdn. Bhd.) thereby rendering the prohibitory injunction nugatory. As such we are of the opinion that pending the disposal of the action proper, the *status quo* should be maintained which in the circumstances would tip the balance of convenience in the respondent's favour.

We now return to the crux of the appeal. Is there a right to support of land in the State of Sarawak? Claims for disturbance of the right to support of land are recognised by the common law as laid down by Cockburn CJ in *Lamb v. Walker* LR 3 QBD 389, 400 and applied locally by the Federal Court in *Guan Soon Tin Mining. Co. v. Ampang Estate Ltd.* [1973] 1 MLJ 25. At p. 28, Ong CJ said:

> In my judgment, common law principles apply to claims for disturbance of the right of support. The law on this subject was enunciated by Cockburn CJ in *Lamb v. Walker* LR 3 QBD 389, 400 as follows:
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> > The fundamental principle on which the decision in *Backhouse v. Bonomi* 9 HLC 503 proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner. According to that decision there is no abstract right of support, independent of acquired easement, from adjacent strata, and the removal of such strata constitutes in itself no wrong. No wrong arises to A, from the excavation of B, on his own soil though the stability of A's adjoining land may be thereby endangered unless and until A sustains actual damage therefrom. And the reason is that the law does not recognise any right in A, to the support of the adjacent soil, otherwise than as involved in the larger proposition that he is entitled to the enjoyment of his own property undiminished and unaltered by any use which B may make of his. B may use his own property as he pleases, provided in so doing he does not do actual damage to his neighbour's property or diminish or disturb his neighbour's enjoyment of it.
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> It is thus clearly the law that when a subsidence occurs to a neighbour's land, he who causes the subsidence is liable in damages.

Notwithstanding the similarity in character after the acquisition of right to support of land and the right to support of buildings, Willes J in *Bonomi v. Backhouse* ER 120 ELBL & EL 654 at p. 655 said:

> The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river, or of air; *Rowbotham v.* W*ilson* (8E & B123); though there may be cases in which it would be sustained as matter of grant (see *The Caledonian Railway Company v. Sprot* (2 Macq. Sc. App. 449); Whilst the latter must be founded upon prescription or grant, express or implied ...

The possible confusion that may arise between the two rights has been highlighted by *Teh* and *Dwyer* in the *Introduction to Property Law* at paras. 1312 and 1313, where the learned authors said:

> Easements must be distinguished from certain similar rights. Although resembling easements, these property and other rights are different in the rules for their creation, operation and extinction ...
>
> One form of natural rights is the right to support to from a neighbour's land. It is 'natural' in the sense that it is an inseparable incident of property ownership. It is unlike an easement which must have been acquired by some kind of grant. The natural right is protected through the torts of nuisance and negligence. It is limited to the support of land in its natural state and does not apply to buildings on the land; but see, *Public Trustee v. Hermann* [1968] 3 NSWR 94 @ 109. Support of buildings can be created in the form of easements: see *Pantalone v. Alaouie* [1989] 18 NSWLR 119.

This common law right of support by neighbouring land has been given statutory recognition by s. 44(1)(b) *National Land Code* which provides:

> Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to the right to the support of the land in its natural state by any adjacent land, and all other natural rights subsisting in respect thereof.

The National Land Code has yet to be extended to Sarawak, where the Sarawak Land Code (Cap. 81) is still in force. Now, Counsel for the appellant has put in argument that because s. 44(1)(b) NLC has no equivalent in the State Land Code, no such right exists in Sarawak even under the common law. We are of the view that there is a fallacy in this argument. It is true that the State Land Code has made no provision on this particular subject, but unless there is express exclusion or prohibition of such right in the Land Code, or there exists any material contradiction with the provisions of the Code (for which there is none) s. 3 of the Civil Law Act 1956 directs the Courts in Sarawak to apply the common law of England as it stood on 12 December 1949 in so far as the circumstances permit. After that material date, the Courts

are apparently free not to follow any new development of the English common law (see *Chung Khiaw Bank v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 CLJ 675 at p. 682; [1990] 1 MLJ 356 at p. 362). What it amounts to is that the application of the common law principles on claims for disturbance of the right of support has now been recognised by statutory law in the States in Malaya, whilst in the East Malaysian States they continue to be available under the common law (pending extension of the NLC) as they stood on 12 December 1949 in Sarawak and on 1 December 1981 in Sabah, and as developed subsequently by our Courts.

Thus, merely because a particular common law right has yet to be given statutory recognition in Sarawak, it does not mean that such right cannot or ceases to exist in the States. Having regard to our rainy climatic condition, the right to support of land is a classic example where the proviso to s. 3 of the Civil Law Act is undoubtedly applicable for the purpose of the application of the common law in the absence of any provision on the subject in the Sarawak Land Code.

In *Wisma Punca Emas Sdn. Bhd. v. Dr. Donal R. O'Holohan* [1987] 1 MLJ 393, in an action founded on natural right of support, the Supreme Court without referring to *Guan Soon Tin Mining,* also held that an owner of land has a right to the support of his land in its natural state by and from the adjacent land as distinct from a right of support from building, about which no such right exists in common law. Although the action in that case was pleaded purely on negligence, nevertheless the trial Judge found the defendant liable for actionable nuisance. On the issue of pleading, (Seah SCJ dissenting) the Supreme Court dismissed the appeal on the ground that in the context of that case, the pleading is the same as saying that the action is based on nuisance. There is however no dissent in the judgment of the Supreme Court on the right of a landowner to the support of his land in its natural state by and from the adjoining land under the Torrens system. In the appeal before us, we have no difficulty on the issue of pleadings, as both nuisance and negligence have been expressly pleaded. The important thing to observe is that the common law right to support of land does exist in Sarawak. The only difference is that in the States of Malaya, the right has received statutory recognition under s. 44(1)(b) of the National Land Code.

A point pleaded in the defence and counterclaim, but has not so far been determined by the Court is the appellants averment that the right of support claimed by the respondent is not a natural but an artificial right on the ground that the slope between the two plots of land had been the result of a third party's activity in dumping excess earth in the valley of appellants land and therefore artificially created. Another point taken is that the right of support

was acquired by the predecessor in title of Lot 413 and could not pass to the respondent as a subsequent purchaser. Another point raised is whether the right claimed by the respondent is an easement and if so whether it could come under the exception to s. 132(1)(f) of the Sarawak Land Code. Apart from the last point, we do not wish to discuss these matters, as these issues can be more suitably dealt with at the trial proper, instead of at this interlocutory appeal stage. It should be noted that although a caveat under the Torrens system can be likened to a statutory injunction of an interlocutory nature, unlike injunction, a caveat binds both the land and the proprietor. As alluded to earlier, in order to bind the appellants' land, the respondent has to apply for a caveat, although she has already obtained an interlocutory injunction against the appellants personally.

The appellants' argument in the alternative is that even if there is in existence a right to support of land, such right cannot constitute a caveatable interest under the Sarawak Land Code. It is however conceded that under s. 323 (1)(a) National Land Code, a landowner in West Malaysian States who claims a common law right of support from an alienated neighbouring land as recognised by s. 44(1)(b), is claiming an interest in the said land and accordingly such interest is clearly a caveatable interest. Because the Sarawak Land Code has no equivalent provisions, such right does not exist in Sarawak, so the argument goes.

We have been told by Counsel for the appellants that s. 323(1)(a) National Land Code extends to any person claiming - "title to or any registrable interests in any alienated land **or** any right to both title or interest". But the Sarawak Land Code (Cap. 81) does not contain similar provision. We are unable to agree that merely because of the absence of similar provision in the Sarawak Land Code, a person with a legal right in land must be treated as having no entitlement to common law right of soil to soil support in Sarawak.

We are also referred by appellants' Counsel to the provision of s. 132(1)(f) of the Sarawak Land Code (Cap. 81) which provides:

> Subject to the provisions of this Code, the registered proprietor of any estate or interest in land to which this section applies shall except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except, ...
>
> (f) Any easement lawfully created and subsisting on the 1 January 1958 or at such later date when the estate or interest affected by such easement becomes included in the Register.

It is the submission of Counsel that under this provision, in order for a landowner to claim for a right to support, the caveator must claim it within the exception of s. 132(1)(f). He refers to Willes J judgment in *Bonomi v. Backhouse* (see ER 120 ELBL & EL 654 at p. 655), which held that:

> the right to support of land and the right to support of buildings stood upon different footing, as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, ... whilst the latter must be founded upon prescription or grant, express or implied, but the character of the rights, when acquired, is in each case the same.

To bring us closer home, the distinction between the two rights have been explained in *Wisma Punca Emas,* referred to earlier on in this judgment and as such we do not think that Willes J observation on the similarity of character between the two right when acquired is meant to rule out the subtle distinction between easements and other similar rights.

What is an easement? It is not a right that exists "*ex jure natural*". In common law an easement is a right attaching to one piece of land (the dominant tenement) entitling the owner thereof to exercise some right over adjacent land in other ownership (the servient tenement) though not to take away part thereof or to take any of its natural produce, or to prevent the owner of the other land from utilising his land in some particular manner. Easements may be positive or negative according to whether the right is to do something or to prevent another from doing something. They may be enacted by statute or by grant, express or implied, or by prescription based on long use or present grant. Among the common recognised easements are right of way, right to light, watercourse and support of buildings. Interference with an easement is a private nuisance and actionable (see the *Oxford Companion to Law*). It is thus distinct from the natural right to support of a landowner from a neighbour's land.

Having considered the submission by both Counsel, we are in agreement with the learned Counsel for the respondent that unlike an easement of the right to support of building, the right to support of land soil by soil should be regarded as an incident of property rather than easement. We have also noted the following commentary on caveatable interest in *MLJ Words and Phrases Judicially Defined* [1990] at p. 87:

> The test to be applied in regard to the respondent's right to enter the caveat can be found also in S.K. Das, *Torrens System in Malaya,* at p. 324 which reads as follows:

> The primary test for a cavetable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an interim injunction? "The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the Courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter or right under circumstances which might not call for the immediate intervention of the Court", Rickmond J said to the caveator's Counsel in *In Re Kauri Timber Co:* "You have not just in re The question is whether, because you might have an injunction against a sale, you may therefore lodge a caveat".

On the purpose of a caveat the learned author at p. 325 said:

> It enables the caveator to retain the matter in *status quo* until his claim is adjudicated upon by the Court and serves as a notice to the world at large of an outstanding equitable claim. The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat, *Municipal District of Concord v. Coles* [1905] 3 CLR 96, 108 *Jit Kaur v. Parl Singh* [1974] 2 MLJ 199 at 201 per Hashim Yeop A. Sani J.

Based on the above exposition of the law, the respondent in this appeal clearly has a caveatable interest under s. 173(a) of the Sarawak Land Code. On s. 132 of the Sarawak Land Code, we are of the view that the words "subject to the provisions of this Code" was relevant for the purpose of interpretation of s. 132(1)(f) which is essentially concerned with the application and the extent of the principle of indefeasibility of title in the Code. Thus s. 132(1)(f) must be read *inter alia*, subject to s. 173 which is the equivalent of s. 323 of the National Land Code and governs the law on private caveat. Section 173(a) provides:

> Any person claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

On the interpretation of s. 132(1) (Cap. 81), which governs the subject on indefeasibility of title in Sarawak, we are of the opinion that giving the words used by the legislature their ordinary sense, it simply means that in the absence of fraud, a registered proprietor under the Land Code shall hold such estate or interest

(i) subject to the interests noted on the Register, and

(ii) free from all other interests not noted in the Register except in six category of cases as provided for in paras. (a) to (f) of sub-s. (1)

Under para. (f), the provision relied upon by the appellant to show that the respondent's right failed to qualify as an enforceable easement, it is provided that such easement must be - "lawfully created and subsisting on 1 January 1958 ..." It is therefore argued that since the respondent alleged right of support was created long after 1958, there could not be any cause of action based on such easement. This argument would indeed be relevant, if the respondent's right of soil to soil support could only be sustained as an easement. For reasons already given this is not so. We are satisfied in this case that the cause of action is not grounded on easement, but on the common law right to support of land, and as such the argument under s. 132(1)(f) is totally irrelevant.

We agree that the respondent in this appeal cannot claim for an easement of support to building unless it has been registered, but her claim is grounded on her natural right of support as incidence of proprietorship under the Sarawak Land Code. She is entitled to soil to soil support from Lot 3029, not as an easement but as a landowner's right *"ex jure natural"*. It is an ordinary right of property necessarily and naturally attached to the soil which requires no separate registration from the land itself. Accordingly, the respondent has a valid cause of action in the pending suit.

We also agree that the Supreme Court having upheld the interlocutory injunction restraining the appellants from cutting, excavating and removing earth constituting the right of natural support to respondent's land, the respondent has by that order obtained a balance of conveniences in her favour for the issuance and extension of the caveat until the disposal of the High Court action. "The lodging of a caveat is really in the nature of the initiation of litigation" and there is no denying that the respondent is entitled to litigate the matter of the dispute which is set up by the caveat.

It must be emphasised once again that the respondent's claim as pleaded is not based on an easement of right to support of building in a situation where for example there is a common wall that exists in a row of shophouses or in a semi-detached building. The claim is based on right of soil to soil support of her land in its natural state, which every landowner must naturally have as a proprietor whether under the Torrens system or under the common law. Although the right may be viewed loosely as an easement, in reality it is a right "*ex jure natural*" attached to the land which can be enforced against an adjoining landowner either in nuisance and/or negligence. We are

a therefore of the view that such right constitutes a caveatable interest under the Sarawak Land Code, notwithstanding that it has not been registered as an easement.

In his judgment in the earlier injunction proceeding, the learned Judge had referred to the "landas season" as a strong reason for the urgency in granting b the reliefs to the respondent. In our view, the Courts are entitled to take judicial notice of the fact that Malaysia records one of the highest annual rainfalls in the world which inevitably makes soil erosion and land slides a matter of forseeable consequences whenever there is disturbance of the soil as a result of human activities.

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As a matter of common sense building retaining walls has become one of the bulwarks in the fight against soil erosion and in the preservation of soil to soil support enjoyed by neighbouring lands particularly where excavation activities have become necessary on one's property. This duty of care owed by d landowners to their neighbours not to disturb or withdraw natural right to support, i.e. soil to soil support, should no longer be questioned in this country as a cause of action in negligence and/or nuisance, where the breach of such duty has caused injury to the adjoining property.

At the hearing proper it is of course for the respondent, to prove whether the e subsidence on Lot 413 was caused by the excavation activities carried out by the appellants on their adjoining Lot 3029, and whether it was such acts that resulted in the withdrawal of support of the respondent's land, which in turn caused damage to her property.

f This appeal is accordingly dismissed with costs, and the deposit be paid to the respondent to account of taxed costs.

Reported by WA Sharif

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